BRIEF SUPPORTING PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the Michigan Supreme Court is reported in 310 Mich. 458, and 17 N. W., 2nd, 251.

The opinion of the Sixth Circuit Court of Appeals has not been reported at the time this brief was prepared.

GROUNDS ON WHICH THE JURISDICTION OF COURT IS INVOKED

The jurisdiction of this court is invoked upon the ground that the summary conviction of a citizen of contempt of court without notice or hearing for allegedly false testimony in inquisitorial proceedings under the Michigan Statute is a deprivation of liberty without due process of law, in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States.

SPECIFICATION OF ERRORS RELIED UPON

The questions involved, set forth in the Petition for Certiorari, constitute a specification of errors relied upon.

FACTS

The facts have been sufficiently stated in the Petition and will not be here repeated.

Due Process of Law, Under the Federal Constitution, Requires that One Charged With Contemptuous Misbehavior Not Committed in Open Court Be Given Notice of the Charge and a Hearing

Due process of law requires that one charged with contempt of court, based upon a misbehavior not occurring in open court, be given notice of the charge and a hearing thereon.

This proposition will not be disputed. It has been expressed by this court in the following language:

> "Due process of law, therefore, in the prosecution of contempt, except of that committed in *open court*, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed."
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> *Cooke v. U. S.*, 267 U. S. 517, 45 S. Ct. 290, 69 L. Ed. 767.

The Michigan statute covering contempts expressly provides for notice and a hearing. (Sec. 13910-13912 C. L. 1929, Appendix B). And the Michigan courts recognize that a disregard of the statutory provisions is a violation of the due process clause.

In re Wood, 82 Mich. 75;
In re Smiley, 235 Mich. 151;
In re Venchell, 279 Mich. 690;
In re Na Lepa, 298 Mich. 310.

A Judge Acting as Inquisitor Does Not Act as a Court. Therefore, Misbehavior Before An Inquisitor Is Not a Contempt in Open Court Punishable Summarily

The Michigan Inquisitorial Statute confers inquisitorial powers upon judges, not upon courts. In actual practice judges recognize this fact and make no pretense of functioning as courts. If they use the court rooms they do so with the doors locked. Frequently, the inquisitorial chambers are at a secret location away from the court house. No court record is made of the inquisitor's activities, other than judgments of contempt of court and grants of immunity. The court room doors may remain locked and the court fail to convene for weeks or months at a time.

Thus, the basic fact which is held to justify a summary conviction for contempt of court is absent in the case of contempuous conduct toward the inquisitor. That fact is the necessity for prompt vindication of the dignity of the court before the public. *(Cooke v. U. S., supra.)*

It follows that the contempt powers of the inquisitor should be limited to those which the inquisitorial statute expressly confers—the power to punish for failure to answer a subpoena or for refusal to answer a question.

In the instant case the Michigan Supreme Court has laid down the rule that contempt of an inquisitor is *ipso facto* contempt of court and punishable as such. However, even if we accept the proposition that the inquisitor bears such a relation to court that contempt of him may be translated into contempt of court, the fact remains that the contempt was not committed in *open court*. Due process then requires that one be charged with this contemptuous conduct and be granted a hearing before it can be made the basis of a judgment of conviction of contempt of

court. For if we assume that the inquisitor bears such relation to the court as to justify proceedings for contempt of court based upon misconduct before the inquisitor, we then have a situation parallel with that of a witness giving testimony before a grand jury. And it is uniformly held that contemptuous conduct before a grand jury can be the basis of a judgment of conviction of contempt of court only after the contemner has been given notice and a hearing before the court.

> *United States v. McGovern,* 60 F. (2nd) 880;
> *O'Connell v. United States,* 40 F. (2nd) 201;
> *Camarota v. United States,* 111 F. (2d) 243;
> *In re Michael,* 146 F. (2nd) 627.

Even Assuming Petitioner's Testimony Had Been Given in Open Court, the Court Had No Personal Knowledge That Petitioner's Testimony Was False and Due Process Requires a Hearing on the Question of the Truth or Falsity of the Testimony

Where the falsity of a witness's testimony is not self-evident, the following rule, laid down in *Ex parte Savin,* 131 U. S. 267, 9 S. Ct. 699, 33 L. Ed. 150, applies:

> "In cases of misbehavior of which the judge cannot have such personal knowledge, and is informed thereof only by the confession of the party, or by the testimony under oath of others, the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished."

Here, Judge Carr admits lack of personal knowledge and frankly states "that from substantial evidence previously submitted to the grand jury there was good and sufficient reason to believe" that petitioner's testimony was false.

In such a case, even had the testimony occurred in open court, the court is without power to punish summarily.

Bowles v. United States, 44 F. (2nd) 115;
In re Gottman, 118 F. (2nd) 425;
People v. Tomlinson, 296 Ill. App. 609, 16 N. E. (2nd) 940;
People v. Butwill, 312 Ill. App. 218, 38 N. E. (2nd) 377.

In *Clark v. United States,* 61 Fed. (2nd) 695, an alleged false statement was made by a juror. The court says:

> "The alleged contempt while within the presence of the court, could not be known to the court in its judicial knowledge or observation, and hence there could not be summary punishment. * * * Due process of law entitled appellant to be informed of the alleged contempt and of what it consisted and also to a reasonable opportunity for preparation of a defense."

This case came before this court but not upon this issue. (*Clark v. United States,* 289 U. S. 1, 53 Sup. Ct. 465, 77 L. Ed. 993.)

Imprisonment for Contempt of Court Based Upon Perjury Alone Is a Denial of Due Process Under the Michigan Statutes

The Michigan Statute insofar as pertinent, provides:

> "Section 13910. CONTEMPT IN COURT OF RECORD; GROUNDS. Section 1. Every court of record shall have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct, in the following cases, and no others:
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> 1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its imme-

diate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority;

2. Any breach of the peace, noise or disturbance, directly tending to interrupt its proceedings;"

It will be observed that to constitute contempt of court, the alleged misconduct must (a) be committed during a sitting of the court, (b) be in its immediate view and presence and (c) directly tend to interrupt its proceedings or to impair the respect due to its authority.

Just as under the Federal statute it must appear that the alleged perjury constituted an obstruction to the administration of justice (*In re Michael,* decided by this court November 5, 1945), so under the Michigan Statutes it must appear that the alleged perjury either tended to directly interrupt court proceedings or to impair the respect due to its authority; and further that such perjury was committed during the court sitting and in its immediate view and presence.

In our original brief (pp. 38-9) in the Michigan Supreme Court we quoted at length from *In re Hudgings,* 249 U. S. 378, 73 L. Ed. 656, 39 Sup. Ct. R. 337. But the Michigan court ignored that case in its decision. The doctrine of the Hudgings case has since been re-affirmed and clarified in *in re Michael, supra.*

Respectfully submitted,

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